

No. 10593.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK KRAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

APR 17 1944

EDUC. R. O'BRIEN,
CLERK

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Introduction.

This is an appeal from a judgment of conviction against the defendant below, Frank Kramer, finding him guilty of violation of Section 174, 21 U. S. C. A., as to counts one and two and a conspiracy, Section 88, 18 U. S. C. A., likewise with the defendants one Katherine Wilson and Edgar Wallace to conspire to do the acts set forth in counts one and two of the indictment, defendant Frank Kramer being convicted and sentenced on all three counts.

The conviction as to counts one and two which are commonly referred to as the Jones-Miller Act, relate to a can of opium labeled Hershey's Chocolates, which was brought into the United States from the Republic of Mexico, by his co-defendant Katherine Wilson and found and concealed on her person at the time she crossed the line between the United States and Mexico at a place commonly

known and called San Ysidro, being a town on the border line between the Republic of Mexico and the United States of America.

Count two relates to the concealment of said opium after the importation and count three being a conspiracy to do the acts set forth in counts one and two of the indictment, the venue being laid in the United States because of an overt act committed within the jurisdiction of the United States. The three defendants Katherine Wilson, Frank Kramer and Edgar Wallace; Frank Kramer and Edgar Wallace were jointly charged. The defendant Wilson plead guilty to counts one and two and was granted probation by the trial judge; defendant Frank Kramer was found guilty on all counts and sentenced to the penitentiary; the defendant Katherine Wilson testified against him as a witness for the United States.

Statement.

The evidence is set forth in narrative form in bill of exceptions contained within the transcript of the record beginning with page 22 and following through to page 67. The testimony above referred to is self-explanatory. However, in more condensed form, with reference to the pages above referred to, it shows that the defendant Frank Kramer (disabled veteran of World War No. 1) and dealer in automobiles, as well as the keeper of a garage in Los Angeles, began a transaction in Los Angeles to sell the defendant, Edgar Wallace, a second-hand Ford automobile, Edgar Wallace being a man of the Negro race.

On the date preceding the date set forth in the indictment of the commission of the offense, to-wit: April 27, 1943, the defendant Frank Kramer and his wife, Rose

Kramer; Edgar Wallace and his wife, together with Katherine Wilson and one Mrs. Gertrude Irvin (the last four persons named all being members of the Negro race) left the city of Los Angeles in the Ford automobile, to be sold to Mr. Wallace, and went to San Diego to arrange finances with a branch of the Bank of America, where Mr. Wallace was known. All six persons above referred to stayed at Mr. Wallace's house the night of the 26th. The next morning about the time that the bank opened, Frank Kramer and his wife, Rose Kramer; Edgar Wallace, Katherine Wilson and Gertrude Irvin drove from Edgar Wallace's house to the bank in the Ford automobile. The financing expected could not be arranged. Some, if not all, of the five parties changed most of their American money into American two-dollar bills. This American money being the legal tender in Mexico because of war conditions.

They then drove from the bank across the border line to the town of Tia Juana, Mexico. Upon arriving in Tia Juana the three women with Rose Kramer, a white woman; Katherine Wilson, a Negro woman, and Gertrude Irvin, a negro woman, got out of the Ford automobile and proceeded on a shopping tour in the business section of Tia Juana. Defendant Frank Kramer and Edgar Wallace took the Ford automobile and drove in and around Tia Juana, including many stops at questionable bar rooms and other places. Their room was being watched by the United States Customs Officers. They then came back to the business section of Tia Juana where the three women were shopping. In the automobile, at that time Kramer and Wallace had a Mexican boy in the car that they had picked up on their trip around Tia Juana. These six people

in this Ford automobile then drove this automobile to a house or cabin at or near the old Tia Juana race track. Most of them got out of the car and went into the house, some of them remained in the car. Those that went in the house came out and all got back in the car and the party then returned to the business section of Tia Juana where they let the Mexican boy out. These movements likewise were observed by the United States Customs Officers. The five people above mentioned then stayed around the business section until they were ready to return and the five did return in the same Ford automobile. On arriving at the border line where the customs officers were located the car stopped, all the parties were questioned by the customs officers and they were asked to declare what property, if any, they were bringing into the United States. They declared some property but no mention was made of opium (which could not be declared, or hypodermic needles). All five persons were then taken into the Customs House and they were there searched, being stripped. None, except Katherine Wilson, were found to have narcotics. Upon searching Katherine Wilson they found concealed on her person, under her underclothes, to-wit: her brassiere, a can marked Hershey's Chocolates, which contained a large amount of smoking opium, likewise they found in a pocket of her shirtwaist or blouse two hypodermic needles in their original cellophane wrapping. Upon later being questioned by the investigating customs officers, Katherine Wilson stated in substance and effect that she did not know what was in the can; that the can had been given her by a Mexican by the name of Frank in Tia Juana with whom she had a slight acquaintance who had told her to take it across the line and deliver it to him at

the Santa Fe Bus Station that night when the bus left, together with the hypodermic needles; and she further stated that she could identify the Mexican. The officers then continued in San Diego to further question all of the defendants except Rose Kramer. They all denied any knowledge of the opium or hypodermic needles. Later the officers took Katherine Wilson from the Federal Building to the Santa Fe Bus Station for the purpose of identifying the Mexican whom she said gave her the Hershey's Chocolates. She found no such Mexican. Several statements, certain statements were made to the officers remaining in the Federal Building while Katherine Wilson was at the Santa Fe Bus Station. Upon her return to the Federal Building she changed her statement and signed a written transcription of her statement which in substance and effect says: that while the party was in Tia Juana after they came back from the race track that Frank Kramer handed her the Hershey's Chocolate can and the package that contained the hypodermic needles but she did not know its contents and later at his request she concealed them next to her skin, under her brassiere, that is the can, and put the hypodermic needles in her pocket but that she did not know the contents until she was arrested and was told of the contents by the Customs Officers. As to the facts above related, the banker and the teller at the Bank of America in San Diego were produced as witnesses and testified as to the transactions at the bank. Several Customs Officers testified. Katherine Wilson testified with which evidence the Government completed its case. A motion to dismiss was made to the Court by the attorney for Edgar Wallace and was granted as to him and the defendant Frank Kramer was ordered to proceed with his

defense. Edgar Wallace, Kramer's wife, also himself, were called as witnesses and they all testified fully as to what they claim the facts to be which in substance were that Frank Kramer had not purchased in Mexico any narcotics or hypodermic needles and did not have any transaction with Katherine Wilson. Rose Kramer testified that she saw Katherine Wilson buy the hypodermic needles and also testified by inference or otherwise that Katherine Wilson and Gertrude Irvin had transactions with a Chinaman and a Mexican in Tia Juana.

The evidence also disclosed that Frank Kramer had a criminal narcotic record, both in the State and Federal Courts. That Edgar Wallace had a narcotic record both in the State and Federal Courts; that Mrs. Irvin had a narcotic penitentiary record and was a known smoker of opium and that Katherine Wilson had lived with Mrs. Irvin a large part of her life and knew Mrs. Irvin to be a convict, having been convicted under the State Narcotic Laws and that she, Katherine Wilson, had been arrested in the State Court charged with narcotic violations because of her association with Mrs. Irvin. Rose Kramer had no narcotic record but she had been arrested. The question of fact then before the Court to determine was, who was telling the truth. Was the accomplice, Mrs. Irvin, telling the truth or was Edgar Wallace, Frank Kramer and his wife, Rose Kramer, telling the truth. The Court resolved the doubt against Frank Kramer and adjudged him guilty. A motion for a new trial and amended motions to vacate the verdict and grant a new trial, transcript of record, page 701, motion was denied by the Court after full hearing, an exception being taken, transcript on appeal, page 91, which exceptions reserves to the jurisdiction of the Court, the points on appeal to be made and discussed.

Point I.

The Verdict Is Contrary to the Law and the Evidence, as to All Three Counts.

COUNT I.

Count I specifically charges Katherine Wilson, Frank Kramer and Edgar Wallace did on or about the 27th day of April, 1943, "then and there knowingly, wilfully, unlawfully, feloniously and fraudulently import and bring into the United States certain narcotics in violation of Section 21, U. S. C. 174.

This section is a companion section of Sections 173 to 178 of the same Code and is the penalty section. The section itself reads:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory thereof contrary to law or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought, etc."

Under the decision of *Palermo v. United States*, 112 Fed. (2d) 922, this section, which provides the penalty for the acts forbidden (39) by Section 173, is a specific section not related to other custom laws and absolutely forbids the importation of smoking opium and provides separate offenses for every act done in connection therewith and under the law, the importation takes place as soon as the international line is crossed.

Under the evidence of the Government in this case, the facts showed that Katherine Wilson with the other defendants, was stopped at the international line by custom

officers; that after some members of the party had made some declarations of goods that they purchased in Mexico, the custom officers took all the five parties into the custom house where they were searched, and there the can of opium together with two hypodermic needles was found upon the person of Katherine Wilson.

The defendant Kramer drove the automobile Katherine Wilson was riding in and Katherine Wilson testified that Kramer had given her the opium and the narcotic needles in Tia Juana. As the importation takes place the minute the narcotics cross the boundary line, certainly Frank Kramer did not import the narcotics. He was not specifically charged with "assisting" in so doing, as he could have been, so therefore as a matter of law, he was not specifically guilty of the offense charged in Count I.

COUNT II.

In this count, Kramer is charged, together with Katherine Wilson and Edgar Wallace, as follows:

"that they did then and there knowingly, wilfully, unlawfully, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment after importation of a certain preparation of opium * * * as said defendants then and there well knew had been imported into the United States of America contrary to law."

Under the evidence of the Government in this case, the evidence shows that Katherine Wilson had the opium concealed upon her person and that as soon as they were stopped at the line she (40) was searched and the opium was taken from her person.

Under the law, some act must be done by the defendants or some of them, other than the act of importation, as this provision of 174 is separate and distinct from the importation and provides for an act done after importation. The authorities for this point are:

Pong Wing Quong v. U. S., 111 Fed. (2d) 751;

Palermo v. U. S., 112 Fed. (2d) 922;

Krench v. U. S., 42 Fed. (2d) 354;

Kurczak v. U. S., 14 Fed. (2d) 109.

In each of these cases the narcotics or liquor had already crossed the international line, and after they crossed the line, the defendants in each case did some act to conceal or facilitate the transportation of or otherwise the prohibited article. The best case being the case from the Ninth Circuit: *Pong Wing Quong v. U. S.*, 111 Fed. (2d) 751.

COUNT III.

This count charges a conspiracy of the three defendants to do the act set forth in Counts I and II.

If the Government's evidence is to be believed regardless of the denials of the defendants, of necessity in order to convict the defendants of the conspiracy "that although it is proper for Congress to create separate and distinct offenses growing out of the same transaction where it is necessary in proving one offense to prove every essential element of another growing out of the same act, conviction of former is a bar to prosecution for latter." Therefore, (41) the conviction of the conspiracy and the substantive offenses in this case are inconsistent and cannot stand,

The above discussion relates to the evidence produced at the trial of the case.

After the trial thereof, the defendant included in his motion an affidavit as to his newly discovered evidence which consisted principally of perjury on the part of Katherine Wilson, the known accomplice. The Court held a hearing upon this and examined Katherine Wilson himself. The transcription of these proceedings are contained with the transcript on appeal beginning with page 82 and ending with page 107. As above stated an exception was taken to the ruling of the Court upon the denial of his motion for a new trial.

This brings use to the discussion of a point as to the whole case to-wit: point 2, the evidence is insufficient to sustain or justify the conviction on any one of the three counts. The reason being as follows:

While it is true in the Federal Court that a defendant may be convicted upon the uncorroborated testimony of an accomplice, this rule has modifications, limitations interpretations and exceptions, the principal one being that where the evidence is before the trial court that the court has a right to adjudge as to the credibility of the witnesses produced at the trial. However, if the case be one that is tried before a jury, the court is compelled to instruct the jury that while a witness can be convicted upon the testimony of an accomplice, that the testimony of an accomplice should be viewed with suspicion and distrust, for the reason of the fact that he or she is a party to the crime and that he or she may have some ulterior motive in so testifying, therefore, if the rule applies to the jury certainly it applies to the judge sitting as a jury in trying the case without a jury. The trial judge in this case is an

eminent and learned lawyer, learned both in State and Federal law and was and is, well aware of the rule set forth under Section 1111 of the Penal Code of the State of California and likewise the rule above set forth as to the testimony of accomplices in the Federal Court. The question is therefore, raised by the writer of this brief: Has the Court's knowledge of the law caused his judgment to be changed were he sitting as a juror in the same connection of the case in the Federal Court where he was instructed by the Court as to the rule in the Federal Courts. A citation of authorities as to this point would be so numerous and so cumbersome as to be annoying particularly to the members of this Court who know the right of this brief. Therefore, suffice it to say the above statement is elementary law, the one versed in the trial of criminal cases in the Federal Court of which all the members of this Court were and so to revert in to the citation of a decision of the Appellate Courts but to an incident to the trial of a case in the United States District Court before one Judge Rudkin who was then sitting as a judge in the United States District Court in Los Angeles. This judge after being a member of this Court and was at the time of his death. The defendant's name was Wong, the case was tried in the court room in the Federal Building built for Judge Erskine Ross. The attorneys for the defendant were Le Compte Davis and John S. Cooper, the case was tried about the year 1913 or 1914. The facts were as follows:

The Mexican accomplice, one Ramiro (I believe) brought the opium across the line, delivered it to a Chinaman in California or Arizona. This Chinaman brought the opium to the defendant's house and the Mexican ap-

peared there for collection of the money for the opium. He testified against the Chinaman, Wong. Judge Rudkin not only instructed the jury as to the law but discussed the facts with them, saying in substance and effect:

“Gentlemen: I know, as a federal judge, that an informer under the revenue laws of the United States receives a monetary consideration, provided the defendant is convicted in the United States District Courts. The Government has offered this informer to you as a witness. I do not believe this testimony. He is an accomplice; the defendant cannot be convicted upon his testimony alone, provided you believe him, but how can you believe a Mexican who only expects to receive American money provided the defendant is convicted. The defendant is a Chinaman he has sworn under oath and, generally speaking, his oath is taken in the name of our God and not his. But regardless of either of those apparently from all the circumstances in this case the Chinaman, the defendant herein, is the man who told the truth, but gentlemen, I cannot decide the question of fact. That question must be decided by you and you alone because you as the triers of fact in this case are the judges of the facts and must return the verdict of guilty or not guilty.”

The verdict in that case was not guilty and so it should have been in the Kramer case.

Frank Kramer had been and may be also at the time of trial or shortly prior thereto addicted to the use of narcotics, the narcotics he used, however, was not smoking opium, but was morphine sulphane. He being, as shown by the records, one of those unfortunate veterans of the

World War No. 1, who was disabled. Seriously, in the World's War No. 1, the medical facilities in that war, as this Court judicially knows, were the best that the time afforded but they had not reached the perfection as shown in World's War No. 2. Therefore, those unfortunate ones in hospitals in France, upon being returned on hospital boats, were given morphine sulphane by nurses and doctors, as this Court knows, many thousands of those addicts which the Government itself has made.

Clarence C. Lewis v. U. S., 295 Fed. 678.

The evidence shows distinctly in this case that the friend and companion, or relative of Katherine Wilson, Mrs. Irvin was known as a smoker of opium. Mrs. Irvin was dead at the time of trial and could not speak; her memory was sacred to Katherine Wilson and therefore, Katherine Wilson testified falsely when she says that Frank Kramer gave her the opium because she was not bringing opium across the line for Frank Kramer, but for Gertrude Irvin.

The State of California case wherein Judge Albert Lee Stephens discussed and analyzed the meaning and effect of circumstantial evidence is the case of *People v. Groves*, 137 Cal. App., page 1, and following. This is not a discussion about opium and therefore the district attorney in his reply brief will harp and harp upon the subject that is in the "Hack" because the man was there charged with bribery and this defendant is charged with importing smoking opium but that case discusses the rule of circum-

stantial evidence from the beginning of time to the present day leading discussion in the opinion of the writer of this brief now existing within the State of California and the statement includes the decision of the Federal Courts within this State.

Therefore, the interpretation to be placed upon circumstantial evidence on appeal is set forth in the case of *People v. Staples; People v. Lamson*, 1 Cal. Rep. (2d), page 648, wherein Judge John Preston, a former United States District Attorney, stated the rule as apply to Federal Courts to be as follows:

“It will be perceived that the evidence in the case relied on to establish the guilt of the defendant is practically circumstantial, and it is elementary law that where the evidence is of such a character it must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. The deduction to be drawn from these circumstances is ordinarily one for the jury, but where, in a case such as this, every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court. The prosecution has the burden of proof. The defendant is presumed innocent until the proof satisfies the jury beyond a reasonable doubt of his guilt. The right of a jury to return a verdict of guilty is not an arbitrary right. The sufficiency of their verdict must be tested by determining whether the evidence upon which that verdict is framed was of such a character that they could say from it that in their judgment no reasonable doubt of the defendant's guilt existed.”

This is the rule in the Federal Court. This was the rule in California at the time Judge Preston delivered his opinion and should be the rule in all courts as it is a rule of the Supreme Court of this our United States.

Therefore, we say that the points raised by this appeal are that the evidence is insufficient to sustain or justify each count as a matter of law of the United States and that the evidence is insufficient to sustain or justify any of the counts as a matter of law and evidence and this Court as the Appellate Court of this, our Ninth Circuit should reverse this case and order it dismissed as did this Court in the case of *Clarence E. Lewis v. United States*, 295 Fed. 678, wherein another disabled veteran was a victim of incriminatory circumstances because of the addiction of narcotics which the Government itself caused.

Respectfully submitted,

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